

# Piercing the Hull

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Long-time readers of this blog may remember the times when we were all very much upset about the never-ending clashes between the German Federal Constitutional Court and the European Court of Justice. Come to think of it, those times aren't all that far in the past, actually, much as it may seem that way nowadays. (Truly, little did we know...) At any rate, as a result of the conflict, German constitutional judges developed the concept of a *europäischer Verfassungsgerichtsverbund* – a very German term which Mark Twain would have liked a lot and which I'd clumsily translate as a "European Club of Constitutional Courts": the realization that constitutional courts in the EU all sit in a common European boat and therefore cannot afford to ignore or undercut or push around each other as vigorously as they'd want to if they wish to survive. They owe each other the responsibility to not rock the common European boat to a point where it runs full of water, capsizes and sinks. The German Federal Constitutional Court, under its current President Andreas Voßkuhle, has been championing this idea for quite some time now after many a year of glorious big-time boat-rocking in Karlsruhe, and in recent times also the ECJ under its new President gradually seems to learn to master the urge to prove one's own supremacy by setting the boat in powerful sideways motion.

The political seas through which the boat navigates, however, have become considerably rougher in recent years. This puts the aforesaid European Club of Constitutional Courts under considerable stress, to an extent that one would hardly have thought possible in the comparatively idyllic days of the Karlsruhe-Luxembourg kerfuffle. How should one deal with the Warsaw and Budapest club members? Are these still courts with which one can cooperate? What if one can't? This week, a number of constitutional judges and high-profile academics from Germany, Austria, Poland and Hungary met at the *Wissenschaftskolleg* in Berlin for a conference to discuss these matters. (Chatham House rules applied.)

As far as Poland is concerned, no regular reader of this blog will be surprised to learn that it has become far from obvious that there even is such a thing as functional constitutional jurisdiction at all nowadays. Three of the Constitutional Tribunal's sitting judges occupy posts for which actually other judges had been elected by Parliament. And that was just the start of a long series of assaults against this formerly venerable institution, most of which have been covered at length on *Verfassungsblog*. A fairly recent report of how far the court has sunk since 2015 can be found [here](#).

Two sitting and three retired constitutional judges from Poland were present at the conference, all elected before the governing PiS party came to power in 2015. According to the organizers, efforts were made to invite judges elected by the PiS majority. But none of them seemed to be eager to make their voices heard among the members of the European Club of Constitutional Courts. Only one PiS judge sent a written statement in which he bizarrely accused his colleague

S#awomira Wronkowska-Ja#kiewicz, who had denounced the arbitrary composition of the court in numerous dissenting opinions, of having gotten to her office in an incorrect way herself: She was the only judge who had not been sworn in by the President. (What he neglected to mention: the head of state wasn't available for that job at the time because he had tragically died shortly before at the plane crash in Smolensk in 2010). The reluctance of the PiS majority in the court to engage in productive argument is apparently not limited to dialogue within the European Club of Constitutional Courts. In general, legal issues are hardly discussed anymore at all in the decision-making chambers, one Polish judge reported. The judges only come together to vote.

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The Hungarian Constitutional Court, on the other hand, appears far less shy in terms of exposing itself to club member critique. It was represented by three sitting judges, all elected under Viktor Orbán's Fidesz majority, who quietly and politely held forth about how Hungarian constitutional law guarantees the independence of the judiciary and how Hungary is a "functioning democratic constitutional state", not without problems, of course, but who is? One expressed mild concern that 30 years after the fall of communism the Venice Commission still distinguishes between "old" and "new" democracies and keeps measuring both with double standards. In general, he said, "rule of law" as a normative yardstick is little more than an empty 19th century ideal and a political joker for all purposes. In that way, all contradiction and conflict was doused with and dissolved in the thin acid of seemingly pluralistic agree-to-disagree relativism that has become so popular in the ranks of the nationalist-populist right.

This was received with a wrinkled brow by some of the German, Polish and Austrian colleagues. He was "irritated", confessed a senior German constitutional judge. After all, effective constitutional jurisdiction is always "a kind of structural opposition to the majority" – does this apply in Hungary under the present circumstances?

The answer: The Hungarian Constitutional Court does exist and keeps adjudicating in a mostly proper way, at times even slapping Viktor Orbán's wrist, for example in its decision of last November to suspend the government's cuts at the expense of early retirees. But when in the really hard cases, when it comes to upholding minority rights against the government in the context of a major political conflict – like in the case of state party funding for opposition parties, for example, or in the CEU case – the right holders cannot expect the Court to come to their rescue.

## Red lines

How should the European Club of Constitutional Courts position itself vis-à-vis such compromised but still to some extent functional members? What is acceptable, what is not? The far end of the spectrum was presented by a constitutional law professor from Caracas, who told the ghastly tale of the *Sala Constitucional* of Venezuela: In Nicolas Maduro's authoritarian regime, constitutional jurisdiction has degenerated into a mere truncheon of the executive which will declare anything unconstitutional that gets into the way of the President. Compared to this, even the current Polish constitutional court looks halfway respectable. So where are the red lines?

Some argued that German constitutional judges should be aware how lucky they were to gain the powerful position they have and how much it takes for a court to be robust enough to weather heavy political storms. In cases as extreme as Venezuela, according to that opinion, the judges of the constitutional court are committing perversion of justice and should be criminally prosecuted. In less extreme cases, however, if a court restrains itself and tries to maintain a minimum of legal functionality in the face of overpowering politics, they deserve understanding and support from the European Club of Constitutional Courts.

+++++A Note from ICON-S++++++

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Others, on the other hand, warned all the more strongly against accepting compromises. The Federal Constitutional Court, one of its members said, bears the responsibility after all to decide whether or not an asylum seeker can be deported or a person wanted by means of an EU arrest warrant can be extradited. A member of the Austrian Constitutional Court added that the rule of law may not a hard-cut concept but still has an indispensable normative core which includes the independence of the judiciary. "One cannot say that if a judge is independent in the morning, then all is well, and if he changes his mind in the afternoon, then it isn't."

The red line is crossed if the "judiciary is switched off or brought in line" ("*Ausschaltung* or *Gleichschaltung*"), said another German constitutional judge who, at the same time, expressed skepticism regarding the sanctioning options of the European Court of Justice in that case. The setup of the judiciary is in the domain of the member states and beyond the competences of the EU, after all. "If I overplay the division of competences by normatizing Article 2 (*TEU*, i.e. *the basic values of the Union including the rule of law*, VB), I will run into acceptance problems as a court."

Another German constitutional judge suspiciously noted that there are "crisis winners" in Luxembourg who hope to boost their own power in the conflict with Poland as a "windfall profit". This, the Karlsruhe judge said sternly, will be "kept in mind" (no one said that club members must renounce all fun, do they?).

## Self-healing powers

Ultimately, it is the Polish and Hungarians who will have to clean up their constitutional order if one day authoritarian rule in their countries comes to an end. In Poland, this day might hopefully come quite soon: Probably in November 2019, there will be general elections, and there is a slight but existent chance that the PiS will be voted out again. Considerations of how to repair and rebuild the constitutional state have already begun: A conference on this topic will take place at the [Batory Foundation](#) in Warsaw at the beginning of next week.

With respect to the Polish Constitutional Tribunal, it is by no means clear, however, that an institution as badly damaged as that can still be repaired at all. According to a professor from Warsaw, the ordinary and the administrative judiciary are preparing themselves to compensate for the Constitutional Court's failure (a notion that left a German judge with a "shiver") and to resort to international and European law for this purpose. Whether the post-PiS Constitutional Court would recover from this loss of relevance appears to be anything but certain.

And as far as the judges are concerned: the first thing on the "day after", one of the Polish participants told me, would be to get rid of the three so-called "anti-judges" who occupy the seats of legally elected members. But even then, of the remaining 12 judges only four will not be nominated by the PiS at the time of the election. To repair the damage done by PiS will take a tremendous lot of skill in order to avoid the creation of a new victimization myth with which PiS could regain power all the more easily in the next round. Many imagine some sort of a round table, like in the 80s. But for that you need the equivalent to the reform communists of the time, people from the outgoing power prepared to negotiate, which probably will not be easy to come by in the event of a change of power in Warsaw.

If, on the other hand, the PiS wins the election, then Poland will very likely go down the authoritarian road to its bitter end, according to the people I spoke to – like Hungary, but without Fidesz's two-thirds majority and the resulting nimbleness in shaping the constitutional framework. In December, the terms of office of another three remaining non-PiS judges at the Constitutional Tribunal will end. And as far as

the judiciary in general is concerned, PiS is expected to fight no holds barred. Even now, judges who refer cases to the ECJ with regard to judicial independence are already being subjected to disciplinary proceedings. If PiS remains in power, they will most likely also come after the retired judges, including constitutional judges, in order to strip them of their status as judges and thereby of their public authority. One more reason to be curious about what this fateful year 2019 – to which I wish you all the best, by the way! – will bring.

## Westminster follies

After a few quiet days over the holiday season, Verfassungsblog has picked up speed again. Plenty of things are happening to keep us busy. Take the **UK**: The parliamentary jumble in the run-up to the "meaningful vote" on Brexit this Tuesday defies all belief and left even the most committed policy nerds seem hard pressed to make sense of what going on in the House of Commons. [JACK SIMSON CAIRD](#) explains the ruthlessly innovative and constitutionally momentous ways in which Speaker John Bercow interprets the parliamentary rules.

In **Hungary**, an effective protest movement against Viktor Orbán seems to be finally forming, but in the meantime the government has announced to pack the judiciary with Fidesz loyalists by means of the introduction of a separate administrative jurisdiction. [RENÁTA UITZ](#) describes with barely concealed anger how the Hungarian government is establishing its illiberal democracy in plain sight and in friendly dialogue with the European constitutional actors.

In **Brazil**, right-wing extremist Jair Bolsonaro has been inaugurated at the beginning of the year. The Federal Judge Sergio Moro, famous for being the one who put former President Lula da Silva in prison, will head the Ministry of Justice, which has been expanded to include gigantic "anti-terrorist" powers. [DOUGLAS CARVALHO RIBEIRO](#) describes his role and intentions (German).

In **Bulgaria**, an attack on the independent judiciary is underway, largely unnoticed by the European public, the latest development of which is analyzed by [RADOSVETA VASSILEVA](#).

In the **USA**, the government is trying to cut back the right of asylum to solve the alleged "immigration crisis" which, according to the analysis of [CLAIRE THOMAS](#), is not taking place at the Mexican border but in the hopelessly inadequate staffing and equipment of the asylum system.

In the **EU**, there are (or should be) no internal border controls under the Schengen treaty, which is why some resourceful member states have come up with the idea to hold private bus companies liable for keeping irregular immigrants out. The ECJ has now put an end to this practice. [FABIAN MICHL](#) examines the decision (German).

[GIACOMO DELEDONNE](#) reports on the decision of the **Italian** Constitutional Court to consider the 4-percent threshold for the European elections unproblematic, in contrast to the German Federal Constitutional Court.



In **Germany**, Federal Minister of Justice Katarina Barley has launched a debate about a women's quota in parliament, which some senior constitutional law professors find a catastrophically bad idea. [CARA RÖHNER](#), on the other hand, argues for a material perspective on democracy that would allow to recognize the lack of representation of women as a democratic problem (German).

A few days before Christmas, the **German** Federal Constitutional Court rejected the motion of the far-right AfD to declare Angela Merkel's refugee policy since 2015 unconstitutional as inadmissible. I regard this as a missed opportunity, for reasons I have written down [here](#). [MATHIAS HONER](#), on the other hand, applauds the decision and argues that there is no general parliamentary prerogative to have a say in all essential decisions of the state (both German).

[WIEBKE FRÖHLICH and INDRA SPIEKER](#) examine the discriminatory effect of algorithms in the case of the software of the **Austrian** employment authority, which filters persons according to their labour market perspectives and assigns poorer prospects to women (German).

[FREDERIK VON HARBOU](#) analyses the **German** government draft of an Immigration of Skilled Workers Act (German).

[ANDREAS GLASER](#) looks at the Institutional Agreement between the EU and **Switzerland** and how it will affect the relationship between both (German).

The **German** Federal Supreme Court has submitted the controversial Children's Marriage Act, which came into force in 2017 and strictly curtails the recognition of marriages of minors abroad, to the Federal Constitutional Court for review, much to the delight of [BETTINA HEIDERHOFF](#) (German).

[LASSE SCHULDT](#) describes how fake news is legally dealt with in **Southeast Asia** and how these laws are abused to fight political opponents (German).

The **UN** Migration Pact has been severely criticized by, among others, the well-known legal philosopher Reinhard Merkel. [HANNAH BIRKENKÖTTER and SINTHIOU BUSZESWKI](#) examine the merits of the critique from the perspective of international law (German).

## Elsewhere

[DANIEL SARMIENTO](#) is amazed at the enormous increase in the importance of the ECJ infringement procedure last year.

[ARMIN VON BOGDANDY](#) asks, against the background of the evaluation of the ECtHR, in whose name the Strasbourg Court adjudicates, and answers: in the name of the European club of liberal democracies.

[ILKER TSAVOULOGLU](#) examines the recent Strasbourg judgment on the rights of the Muslim minority in **Greece**.

[OLIVIER BEAUD](#) reviews the recent history of the Fifth Republic as, this being **France**, a *bande dessinée*.

[AGUSTÍN RUIZ ROBLEDO](#) sees the decision of the **Irish** Senate to ban imports of products from the Israeli occupied territories as an interesting signal of the emancipation of the Second Chamber.

[BEATRÍZ ACHA](#) does not consider the new right-wing VOX party in **Spain** to be (neo-)fascist.

[PHILIP ALLOTT](#) warns on the occasion of the Brexit disaster against the direct-democratic tyranny of the majority in the **UK**.

[ROBERT CHESNEY](#) answers some urgent questions about the possibility of **US** President Trump getting his wall financed by declaring a national emergency.

[ALVIN CHEUNG](#) writes about the growing doubts about the independence of the judiciary in **Hong Kong**.

[JENNY DOMINO](#) describes how Facebook is becoming a tool for suppressing freedom of expression in the **Philippines** and **Myanmar**.

So much for this first editorial in 2019. All the best to you, and take care,

Max Steinbeis

